[Cite as *In re J.S.*, 2015-Ohio-4990.]

Court of Appeals of Ohio

EIGHTH APPELLATE DISTRICT
COUNTY OF CUYAHOGA

JOURNAL ENTRY AND OPINION
No. 102800

IN RE: J.S.

JUDGMENT:
REVERSED; ADJUDICATION VACATED

Civil Appeal from the
Cuyahoga County Court of Common Pleas
Juvenile Division
Case No. DL-13-111426

BEFORE: McCormack, J., Kilbane, P.J., and E.T. Gallagher, J.

RELEASED AND JOURNALIZED: December 3, 2015

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TIM McCORMACK, J.:

{¶1} J.S. appeals his delinquency adjudication for rape made in the Cuyahoga County Court of Common Pleas, Juvenile Division. He argues that finding him delinquent was not supported by sufficient evidence and was against the manifest weight of the evidence. For the following reasons, we reverse the judgment of the trial court and vacate the adjudication.

Procedural History

{¶2} J.S. was charged with one count of rape of a child less than 13 years old in violation of R.C. 2907.02(A)(1)(b), a first-degree felony. The complaint arose from facts that occurred on or about June 1, 2012, at J.S.'s home.

{¶3} The case was tried on August 26, 2014, at which time the court heard testimony from the alleged victim, A.G., and Officer Eric Newton. At the close of the state's case, the defense moved for acquittal. The trial court denied the motion. Following trial, the court adjudicated J.S. delinquent of rape and placed J.S. on community control sanctions for three months. J.S. now appeals, raising two arguments within one assignment of error:

> The finding of delinquency was against the manifest weight of the evidence, and not supported by sufficient evidence, because the state did not prove any penetration, nor did it prove the age of the victim.

Evidence at Trial

{¶4} A.G., who was born on April 6, 2000, and was 14 years old at the time of trial, testified that "two years ago in the summertime" she went to J.S.'s house to see J.S.'s sisters, with whom she was friends. The families were neighbors and she had known J.S. for approximately two years at the time. A.G. and J.S.'s sisters, who were around the same age as A.G., had planned to go swimming on that particular summer day. When A.G. arrived at J.S.'s house, neither J.S.'s sisters nor his parents were home. A.G. testified that J.S. told her that his sisters went to the pool and would be back shortly. A.G. stated that she and J.S. then went to the basement. They sat on the couch and watched a movie called Leprechaun in the Hood, which she enjoyed.

{¶5} A.G. testified that while sitting on the couch watching the movie, J.S. "started kissing on me and touching me." She stated that J.S. kissed her neck and touched her on the thighs and elsewhere. When asked if she could tell the court where else J.S. had touched her, she replied, "No." A.G. then testified that, eventually, she was lying down on the couch and J.S. was lying on top of her. She was naked. J.S. had pulled his boxers down and did not remove them entirely. When asked what happened after J.S. pulled his boxers down, A.G. replied that she did not want to answer. Once again, the prosecutor asked A.G. what J.S. was doing when he pulled his boxers down, and A.G. repeated that she did not want to answer the question.

{¶6} Thereafter, the following exchange took place:

Q: How long were you naked when his boxers were down?

A: About 20, 25 minutes.
Q: When did [J.S.] pull back up his boxers?

A: When we got finished.

Q: When did you put your clothes back on?

A: When we got finished.

Q: Did [J.S.] say anything when you say we finished?

A: I don't remember.

Q: * * * What do you mean by "when we finished"?

A: I meant when we finished having sex.

Q: What happened after you guys finished?

A: I went home and took a shower.

{¶7} A.G. then stated that she did not tell anyone what happened because they agreed, after having sex, not to tell anyone. She testified that it was J.S.'s idea not to tell anyone. She further testified that she did not want to tell her mother about the incident because she knew her mother would "be angry with me," and when her mother did find out what happened, she "was pretty mad." A.G. stated that her grandmother was also angry and "said it was all my fault."

{¶8} On cross-examination, defense counsel inquired about A.G.'s Kik account. A.G. explained that Kik is a free texting app that individual's can use without having a mobile phone number. A.G. testified that she had a Kik account in 2013 and her name on the account was "I'll be that pretty MF," along with a smiley face icon. A.G. acknowledged that she communicated with J.S. about the incident through Kik.

{¶9} A.G. testified that after speaking with a detective, she sent J.S. a Kik message in which she told J.S. that she lied to the detective and told him "we didn't do anything." She told J.S. in the message that "even if we did it, it is not rape so I might as well just say it was consensual sex, I think." On re-direct examination, A.G. explained that she did, in fact, tell the detective "what actually happened. * * * That me and [J.S.] we did have sex." A.G. further explained that she lied to J.S. about what she told the detective because J.S. was "begging me and telling me not to tell because it was going to mess up his life" and she did not want J.S. to be mad at her. In fact, A.G. admitted that she did not want to testify against J.S. Nor did she want her grandmother, who was in the courtroom, to hear what A.G. had to say about the alleged incident.

{¶10} Officer Eric Newton, the investigating officer, testified that he received a call from dispatch in July 2013, regarding a female who stated that she found a male in bed with her daughter. When he arrived upon the scene, he learned that the alleged incident had not just occurred, but rather it had occurred about a year ago. A.G.'s mother, who had called the police, was "very irate" and she directed Officer Newton to the home where the alleged offender, J.S., lived. While waiting for A.G. to arrive home, Officer Newton and A.G.'s mother walked to J.S.'s home, where A.G.'s mother proceeded to shout at J.S.'s parents, who were on their front porch. Officer Newton spoke with J.S., who advised the officer that he treated A.G. like a sister and denied that any inappropriate behavior had occurred.

{¶11} Officer Newton testified that when A.G. arrived home approximately 20 minutes later, she was "distraught" and she "appeared to be hysterical." She was not initially responding to the officer's questions, and she was "hanging onto" her mother. After several minutes, A.G. began talking with the officer. According to Officer Newton, at this point, A.G. advised him of the details of the alleged incident that occurred "some time in the summer * * * when she was 12 [years old]." After speaking with A.G., Officer Newton advised J.S.'s parents that he would be filing a report on the matter.

Law and Analysis

{¶12} J.S. argues that the juvenile court's adjudication of delinquency was against the manifest weight of the evidence and not supported by sufficient evidence. Specifically, he claims that the state failed to prove essential elements of the offense: penetration and the victim's age.

{¶13} In addressing J.S.'s argument pertaining to the sufficiency of evidence, we note, initially, that the same standard of review for sufficiency of the evidence applies to juvenile and adult criminal matters. *In re G.R.*, 8th Dist. Cuyahoga No. 90391, 2008-Ohio-3982, ¶ 16, 37, citing *In re Washington*, 81 Ohio St.3d 337, 691 N.E.2d 285 (1998).

{¶14} When assessing a challenge of sufficiency of the evidence, a reviewing court examines the evidence admitted at trial and determines whether such evidence, if believed, would convince the average mind of the defendant's guilt beyond a reasonable doubt. *State v. Jenks*, 61 Ohio St.3d 259, 574 N.E.2d 492 (1991), paragraph two of the

syllabus. "The relevant inquiry is whether, after viewing the evidence in a light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime proven beyond a reasonable doubt." *Id*. A reviewing court is not to assess "whether the state's evidence is to be believed, but whether, if believed, the evidence against a defendant would support a conviction." *State v. Thompkins*, 78 Ohio St.3d 380, 390, 678 N.E.2d 541 (1997).

{¶15} J.S. was found delinquent of rape in violation of R.C. 2907.02(A)(1)(b), which provides that "[n]o person shall engage in sexual conduct with another who is not the spouse of the offender or who is the spouse of the offender but is living separate and apart from the offender, when * * * [t]he other person is less than thirteen years of age, whether or not the offender knows the age of the other person."

{¶16} Under R.C. 2907.02(A)(1)(b), the date of the offense is an essential element required in order to prove that the victim was less than 13 years of age at the time of the offense. *State v. Schwarzman*, 8th Dist. Cuyahoga No. 100337, 2014-Ohio-2393, ¶ 15. However, in proving the victim's age, "the state need not establish precise dates of when the offense occurred, as long as a rational trier of fact could find that the victim was less than 13 years of age at the time of the offense." *Id.* at ¶ 16, citing *State v. Nelson*, 8th Dist. Cuyahoga No. 54905, 1989 Ohio App. LEXIS 147 (Jan. 19, 1989).

{¶17} Here, A.G. testified that she was born on April 6, 2000. She also testified on August 26, 2014, that "two years ago in the summertime" she went into the basement with J.S. wherein the alleged incident occurred. Officer Newton testified that when he

investigated the incident in July 2013, he learned that the incident had occurred the previous summer "and that [A.G.] was 12 at the time." A rational trier of fact could find that this testimony demonstrated that during the summer months of 2012, at the time of the alleged offense, A.G. was less than 13 years of age. The testimony is therefore sufficient evidence of the essential element of the victim's age.

{¶18} Under this statute, the state must also prove that "sexual conduct" occurred. "Sexual conduct" is defined as follows:

> vaginal intercourse between a male and female; anal intercourse, fellatio, and cunnilingus between persons regardless of sex; and, without privilege to do so, the insertion, however slight, of any part of the body or any instrument, apparatus, or other object into the vaginal or anal opening of another. Penetration, however slight, is sufficient to complete vaginal or anal intercourse.

R.C. 2907.01(A).

{¶19} Therefore, in order to sustain an adjudication on a rape charge, the state must establish penetration. This court has repeatedly held that evidence of the slightest penetration, entering the vulva or labia, is sufficient to support a rape conviction. *State v. Fulkerson*, 8th Dist. Cuyahoga No. 83566, 2004-Ohio-3114, ¶ 21; *State v. Falkenstein*, 8th Dist. Cuyahoga No. 83316, 2004-Ohio-2561, ¶ 16; *State v. Blankenship*, 8th Dist. Cuyahoga No. 77900, 2001 Ohio App. LEXIS 5520, * 12 (Dec. 13, 2001).

{¶20} Here, the entirety of the evidence concerning the interaction between A.G. and J.S. consists of A.G.'s testimony. A.G. testified that J.S. kissed her neck and touched her thighs; he was lying on top of her while she was naked and his boxers were down but not completely off for approximately 20 to 25 minutes; when they were finished

"having sex," she put her clothes back on; and she went home thereafter and took a shower. There is no reference, however, to any type or degree of penetration during this interaction. Nor is there any specific reference to male or female genitalia. Where the state's evidence is essentially the testimony of the victim and the victim fails to testify as to any degree of penetration, there is insufficient evidence to sustain a rape conviction. *State v. Ferguson*, 5 Ohio St.3d 160, 168, 450 N.E.2d 265 (1983) (victim's testimony that she had "intercourse" was insufficient to sustain rape convictions absent evidence of penetration or explicit reference to sexual intercourse).

{¶21} Although A.G.'s testimony that she and J.S. "had sex" could be interpreted as penetration from the act of having sexual intercourse, as well as various other interactions, this conclusion would compel this court to decide this case based on facts not on the record. Being mindful of the serious nature of the charge, its lifetime implications, and the state's burden of proof beyond a reasonable doubt, this court "will not draw inferences against the accused from what must be characterized as vague and ambiguous testimony." *Id.* While we recognize the sensitive nature of the testimony and we respect the instinct of an adult to protect the children, our criminal justice system, as a matter of law, mandates that the state prove the essential elements of its case with sufficient detail, beyond a reasonable doubt. In this case, the state failed to elicit the details necessary in order to demonstrate or otherwise prove penetration, however slight, sufficient to satisfy the element of "sexual conduct."

{¶22} In light of the above, we find the state failed to show by sufficient evidence the necessary elements to support a finding of delinquency by reason of rape in violation of R.C. 2907.02(A)(1)(b). The assignment of error as it relates to sufficiency of the evidence is sustained. Because we find that there was insufficient evidence to support J.S.'s adjudication of delinquency, his argument as it pertained to the manifest weight of the evidence is moot. *See* App.R. 12(A)(1)(c).

{¶23} Judgment reversed. Adjudication vacated.

It is ordered that appellant recover of appellee costs herein taxed.

The court finds there were reasonable grounds for this appeal.

It is ordered that a special mandate issue out of this court directing the juvenile court to carry this judgment into execution.

A certified copy of this entry shall constitute the mandate pursuant to Rule 27 of the Rules of Appellate Procedure.

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TIM McCORMACK, JUDGE

MARY EILEEN KILBANE, P.J., and
EILEEN T. GALLAGHER, J., CONCUR